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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

**Nos. 221 and 222, Misc.**

PEOPLE EX REL. TONY MARINO,
*Petitioner,*

*vs.*

JOSEPH E. RAGEN, WARDEN, ETC.,
*Respondent,*

and

TONY MARINO,
*Petitioner,*

*vs.*

STATE OF ILLINOIS,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

## BRIEF AND ARGUMENT OF AMICUS CURIAE IN OPPOSITION.

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N PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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## BRIEF AND ARGUMENT OF AMICUS CURIAE IN OPPOSITION.

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*To the Honorable Fred Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:*

## PRELIMINARY STATEMENT.

This brief is submitted as *amicus curiae* by the State's Attorney of Winnebago County, representing the County of Winnebago, a subdivision of the State of Illinois.

The State's Attorney of said County was *amicus curiae* in the lower court decisions sought to be reviewed by this petition. The State's Attorney, however, was not officially notified of this petition and does not have a copy of the Abstract of Record filed in this Court. The Attorney General of the State of Illinois has consistently confessed error in every step of the many legal proceedings involving this petitioner, and in substance did not oppose the petitioner in the cases sought to be reviewed in this petition. As a matter of fact, the position of the State's Attorney was the one adopted by the Supreme Court of Illinois in their decisions on these cases. The State's Attorney of Winnebago County, Illinois has been the only one to oppose this petitioner at any time.

The case arose in Winnebago County and that County is vitally concerned. In order to insure that there will not be another "confession of error" in this Court this brief has been prepared and is submitted.

## STATEMENT OF FACTS.

Due to the fact petitioner's statement of the matters involved does not accurately state what has occurred and is largely argumentative, the following statement is submitted:

The petitioner was indicted April 17, 1925 by the Grand Jury for the April, 1925, term of the Circuit Court of Winnebago County, Illinois, on a charge of murder. On April 21, 1925, he appeared in open court, was arraigned, furnished with a copy of the indictment, and a complete list of witnesses and jurors. On April 23, the record shows that the Court explained to Marino through two interpreters, Daniel Torrisi and Joe Marino, the meaning and effect of a plea of guilty, and the punishment that the Court could render in the case. After such explanation, Marino filed a written waiver of trial by jury and entered a plea of guilty to the indictment. On April 24, 1925, Marino was in Court in person, and the Court on its own motion heard evidence in Mitigation of the offense. On April 25, 1949, with Marino in court in person, judgment and sentence of the court was passed and Marino sentenced to life imprisonment. The record includes the signed jury waiver which includes a plea of guilty.

After twenty-two years of incarceration without complaint that he was innocent or that he did not have a fair trial, petitioner filed a petition for writ of habeas corpus in the Circuit Court of Winnebago County, Illinois. The petition was heard and the writ ordered quashed on the grounds that the Court had no jurisdiction to grant said writ on the facts disclosed. Thereafter, the petitioner filed a petition in this Court for a writ of certiorari. The petitioner's petition was granted and the judgment, upon a confession of error by the Attorney General of the State

of Illinois, vacated and the cause remanded to the Circuit Court of Winnebago County for further proceedings in accord with this Court's mandate. (*Marino* v. *Ragen,* 332 U. S. 561, 68 S. Ct. 240, 92 L. Ed. 170.) Subsequently, this Court was petitioned to clarify its opinion and mandate, and in *Marino* v. *Ragen,* 333 U. S. 852, 68 S. Ct. 729, 92 L. Ed. 1133, this Court declined to do so, thereby approving the interpretation of the Mandate by the Circuit Judge of Winnebago County who had ordered a full hearing.

The Circuit Court of Winnebago County thereupon conducted an extensive hearing into the merits of the petitioner's contention that he had not had a fair trial, and the Court found that petitioner's contentions were without merit and that his constitutional rights were not violated; the petition was again denied. The petitioner then petitioned this Court on Writ of Certiorari to review the action of the Circuit Court of Winnebago County. This Court denied the petition in No. 30 Misc. *Marino* v. *Ragen,* 93 L. Ed. 862; rehearing denied, 93 L. Ed. 1038. The findings and order of Honorable William R. Dusher, Judge of the Circuit Court of Winnebago County, Illinois, which were sought to be reviewed in the above petition for Writ of Certiorari, is incorporated in this brief as Exhibit "A".

In the meantime, petitioner had filed in the Supreme Court of Illinois a petition for writ of mandamus, a petition for a Writ of Certiorari, a petition for Writ of Habeas Corpus, and a petition for writ of error. The petition for writ of mandamus and certiorari were denied, but the petitioner was allowed to file the petitions for Writ of Habeas Corpus and for Writ of Error. After consideration of the above, the Supreme Court quashed the writ of habeas corpus in *People ex rel. Marino* v. *Ragen,* 404 Ill. 35, and on the writ of error, in *People* v. *Marino,* 404 Ill. 37, affirmed the Circuit Court of Winnebago County, Illinois. *It is the above two decisions which are sought to be reviewed in this action.*

## ISSUES INVOLVED.

This petition for writ of certiorari is to review the action of the Supreme Court of Illinois in the refusal to grant a writ of habeas corpus and in affirming the original judgment of conviction on the writ of error.

In the petition for writ of habeas corpus filed in the Supreme Court of Illinois as an original action, the Court held that since nothing new was presented in the petition that had not been finally determined in the petition for writ of habeas corpus filed in the Circuit Court of Winnebago County, Illinois, upon which certiorari was denied in this Court, and since that was a final determination when this Court refused certiorari that the matter was *res judicata,* and therefore the Court quashed the writ. The only issue before this Court is whether the Supreme Court of Illinois erred in so disposing of the petition.

The petition for writ of error is somewhat more involved. There the Supreme Court of Illinois held that the constitutional questions involved in the original proceeding had been passed upon in the Circuit Court of Winnebago County in the petition for writ of habeas corpus, which decision was subject to review only by this Court, and this Court having refused to grant certiorari that those matters were *res judicata* and the Supreme Court of Illinois would not review them further. That left the contentions by petitioner that the Grand Jury had not been drawn according to Illinois law, and that the State's Attorney instead of the judge charged the grand jury, and that two officers instead of one were sworn to be in charge of the jury. The Supreme Court of Illinois held that the above objections as to the assembly, selection and conduct of the Grand Jury were without merit, and affirmed the judgment of the Cir-

cuit Court of Winnebago County. The issue before the Court is whether the Illinois Court erred in their decisions.

The petitioner has in his petition and brief and argument attempted to interject into this appeal another review of the action of the Circuit Court of Winnebago County in quashing the petitioner's writ of habeas corpus. Petitioner has dwelt at length on the proceedings in the hearing before Judge Dusher on that writ. But it is obvious that that matter does not properly come into this petition because here it is the action of the Supreme Court of Illinois that is concerned (a) in their quashing a writ of habeas corpus filed as an original action, and (b) in affirming the 1925 judgment of the Circuit Court of Winnebago County on the writ of error.

## SUMMARY OF ARGUMENT.

Previous denial of a petition for writ of habeas corpus may be considered and given controlling weight in denying a subsequent petition.

The petition for writ of habeas corpus now under consideration alleges identical grounds as a previous petition upon which a complete hearing was had and final decision made quashing the writ. Therefore, it was proper for the Supreme Court of Illinois in its judicial discretion to quash this writ.

The principle of *res judicata* applies to criminal cases as well as civil cases.

In the petition for writ of certiorari now under consideration, identical contentions are made which were previously finally disposed of, and that disposition is *res judicata* as to those contentions. Under Illinois law objections to the assembly of the Grand Jury can only be taken by a challenge to the array or by motion to quash the indictment.

The fact that the State's Attorney instead of the Judge charged the Grand Jury does not affect the validity of the indictment, nor does the fact of more than one officer appointed in charge of the Grand Jury.

Matters concerning the assembling, and proceedings of the Grand Jury are matters of Illinois state law with which this Court has no interest.

## ARGUMENT.

### I.

We are first considering the petition for writ of certiorari on the quashing of the petition for writ of habeas corpus by the Supreme Court of Illinois (lower court opinion, *People ex rel. Marino* v. *Ragen*, 404 Ill. 35).

Although the law of *res judicata* has not been strictly applied to successive petitions for writ of habeas corpus (except in two cases, *Allman* v. *Aldredge*, 65 Ga. 269, 18 S. E. 2d 478, *Williams* v. *Lawrence*, 193 Ga. 381, 18 S. E. 2d 463), the law is well settled that a denial of a previous similar petition for writ of habeas corpus may be considered and may be given controlling weight in denying a subsequent petition. (*Salinger* v. *Loisel* (1924), 265 U. S. 224, 68 L. Ed. 989, 445 Ct. 519; *Wong Doo* v. *United States* (1924), 265 U. S. 239; *Sander* v. *Johnston* (1926 CCA 9th Cal.), 11 F. 2d 509; *Pogett* v. *McCauley* (1938 CCA 9th Wash.), 95 F. 2d 839; *Remaley* v. *Swope* (1938 CCA 9th Wash.), 100 F. 2d 31; *United States ex rel. Bergdoll* v. *Drum* (1939 CCA 2d NY), 107 F. 2d 897.)

In determining whether such a prior determination should be controlling, the cases hold that it is important to consider whether the grounds of the prior petition are the same as alleged in the subsequent petition, the fullness of consideration which had been given the prior petition, and the character of the Court to whom the first petition was addressed. (*Salinger* v. *Loisel, supra, ex parte Cuddy* (1889:CC), 14 Sawy. 171, 40 F. 62; *Wheeler* v. *Kaeser* (1942; DC Mo.), 45 F. Supp. 937.)

In the present case the petition for writ of habeas corpus now under consideration alleges identical grounds for

relief as did the petition for writ of habeas corpus which was addressed to the Circuit Court of Winnebago County, Illinois. After a complete hearing the writ was quashed, and upon petition for certiorari direct to this Court, such certiorari was denied. Under Illinois law habeas corpus proceedings are not reviewable in the Illinois courts. (*People ex rel. Titzel* v. *Hill,* 344 Ill. 264, 176 N. E. 360; *People ex rel. Niemoth* v. *Traeger,* 339 Ill. 356, 171 N. E. 548; *People ex rel. Wakefield* v. *Montgomery,* 365 Ill. 478, 68 N. E. 2d 868; *United States ex rel. Mills* v. *Ragen,* 77 F. Supp. 15.) Therefore, when this Court denied certiorari, the judgment of the Circuit Court of Winnebago County, Illinois became final and not subject to review.

Since the judgment of the Circuit Court was final, and was based on identical grounds as the one in the Illinois Supreme Court, it is entitled to great weight in the subsequent petition. In *Magniglia* v. *Commander of the Guisseppe Verdi* (1935 DC Mass.), 5 F. 2d 680, the Court was faced with a petition for a writ of habeas corpus which was similar to one previously adjudicated and the Court dismissed the petition stating that while the decision of the New York Federal Court "may not be *res judicata,* it has long been the established practice that one Court will not allow a writ when some other judge has refused it unless a substantial change in the circumstances has intervened." To the same effect is *Demaurey* v. *Swope* (CCA Wash.), 95 F. 2d 839; *Ex parte Tremper,* 126 N. J. Eq. 276, 8 A. 2d 279; *Voigt* v. *Mahoney,* 10 Wash. 2d 157, 116 P. 2d 300; *In re Clyne,* 52 Kan. 441, 35 P. 23. In *Ex parte Moebus* (1906 CCA N. H.), 148 F. 39, the petitioner had made two prior applications for the writ, one to a justice of the Supreme Court and another to the District Court for New Hampshire, and finally the instant one to the Circuit Judge, and the Court said in denying the writ that as a practical matter of administration no judge should allow

a writ when some other judge has refused it. See *Beard* v. *Bennett* (1940), 72 App. DC 269, 114 F. 2d 578; *Wong Sun* v. *Fluckey* (1922 D. C. Ohio), 283 F. 989 (aff'd in 265 U. S. 239); *United States ex rel. Innes* v. *Hiatt* (1943; DC Pa.), 50 F. Supp. 756.

In *Dorsey* v. *Gill* (1945 88 PP. DC 9), 148 F. 2d 857, the entire subject is thoroughly considered reviewed and the Court held that the fact that the same issues had been decided in a former proceeding should as a matter of judicial discretion be given controlling weight.

In the case at bar, the hearing in the first petition was exhaustive and detailed. The findings of the Honorable William R. Dusher, Circuit Judge of Winnebago County, Illinois, which are attached to this brief as Exhibit "A", show that there was a full and complete examination of the same grounds that are made in this petition and those grounds were found to be without merit. Certainly that should be deemed sufficient that in the sound judicial discretion of the Supreme Court of Illinois when faced with another petition alleging the same facts it was proper to quash the writ deeming the previous adjudication to be of controlling weight.

## II.

As to this petition for writ of certiorari to review the Supreme Court of Illinois for their action in affirming the 1925 judgment of conviction of Marino (*People ex rel. Marino* v. *Ragen*, 404 Ill. 37), the petitioner has again brought up the same contentions decided in the petition for writ of habeas corpus decided against this petitioner in the Circuit Court of Winnebago County, Illinois. (There are some other contentions to be considered later.) As to the contentions of constitutional violation by the alleged failure to appoint counsel and the alleged absence of a plea of record, those matters were decided in the

aforementioned petition for writ of habeas corpus and are now *res judicata,* which doctrine applies to criminal cases as well as civil cases. (*Sealfon* v. *United States,* 332 U. S. 474, 92 L. Ed. 180, 68 S. Ct. 237; *United States* v. *Oppenheimer,* 242 U. S. 85, 61 L. Ed. 161, 37 S. Ct. 68; *United States* v. *DeAngelo* (CCA 3d N. J.), 137 F. 2d 466; *Wells* v. *United States* (CCA 5th 1946), 158 F. 2d 833.) This doctrine operates to settle matters conclusively which were determined in the habeas corpus hearing, which findings are incorporated in this brief as Exhibit "A".

A case which is directly in point on this question of *res judicata* is *Wilson* v. *United States* (CCA 8th 1948), 166 F. 2d 527. The appellant was convicted on a plea of guilty and sentenced to ten years' imprisonment. He had filed three substantially identical motions in the District Court to vacate the sentence and correct the judgment. A full hearing was had in the District Court and his first two motions overruled. This case arose when appellant appealed from a third order denying his motion and the Circuit Court of Appeals held that the former judgments denying the motions were *res judicata* and it would be presumed that every issue of law involved in it had been tried and decided. (See 50 C. J. S. Judgments, Sec. 837.) Also in *Wells* v. *United States, supra,* the appellant had previously made a motion to vacate his sentence which had been appealed to this Court (*Wells* v. *United States,* 318 U. S. 257, 87 L. Ed. 746, 63 S. Ct. 582) and denied, and the appellant had unsuccessfully prosecuted two habeas corpus proceedings of which the Court took judicial notice. In the second habeas corpus proceeding there was a full hearing and the Court made findings of fact against the appellant. The Circuit Court said: "We see no reason why the doctrine of *res judicata* should not apply to this second attempt to relitigate the same matters."

The case above cited is very similar in its facts to the

petitioner's case. Here there has been a previous final determination of constitutional questions involved and under the doctrine of *res judicata* the petitioner is precluded from relitigating the same matters by writ of error to the Supreme Court of Illinois. See also *State* v. *Hensley*, 27 Wash. 2d 938, 181 P. 2d 828, where defendant's contentions relative to vacation of judgment and sentence were fully considered on a prior appeal from a decision denying a petition to withdraw a plea of guilty, and the Court held the defendant could not have the same contentions reconsidered on a motion of *coram nobis*.

There is no question but what the petitioner has had his day in court. In fact, he has been to the Circuit Court of Winnebago County, Illinois twice; he has been to the Supreme Court of Illinois in four cases, and to this Court on three previous occasions, not including the petition for a rehearing. Certainly, there must be an end to this matter, and since petitioner's contentions were finally determined once, it is *res judicata*.

As for the contention of the petitioner that the Grand Jury was improperly assembled, such objection under Illinois law can only be taken by a challenge to the array or motion to quash the indictment. (*Bruen* v. *People*, 206 Ill. 417; *People* v. *Liber*, 357 Ill. 423, *People* v. *McCauley*, 256 Ill. 504, *People* v. *Munday*, 293 Ill. 191, *People* v. *Green*, 329 Ill. 576.) It will be presumed unless the contrary is shown that the persons summoned by the Sheriff for Grand Jury duty were duly qualified; and were selected from the County; and that the Sheriff did his duty according to the Statute. (*Fletcher* v. *People*, 81 Ill. 116, *Bruen* v. *People, supra.*) Where there is no showing of a challenge to the array nor a motion to quash the indictment, and there is no showing that the people constituting the Grand Jury were not from the County and duly qualified to act, the indictment cannot be later attacked.

As for the contention that the State's Attorney charged he Grand Jury instead of the Circuit Court Judge, that oes not affect the validity of the indictment unless the etitioner could show that he was prejudiced thereby. *People* v. *Jordan,* 292 Ill. 514; *People* v. *Gould,* 345 Ill. 88.) The petitioner has not shown that he was prejudiced n any manner in this regard. The petitioner's allegation f error that there was more than one officer appointed n charge of the Grand Jury contrary to the Statute has o merit whatsoever. (*People* v. *Gould, supra.*)

In any case, these matters are strictly an interpretation f local Illinois law with which this Court has often stated hey have no interest since there is no constitutional ques-ion involved.

**Conclusion.**

It is important that it be kept in mind that this peti-ion involves a request to review original actions in the Supreme Court of Illinois. It does not and cannot involve a review of the action of the Circuit Court of Winnebago County, Illinois in denying the petitioner's application of a writ of habeas corpus filed in that Court. That case is finally determined and only comes into this case to show that the matters here involved have been litigated once and settled. Note incidentally, it is the petitioner who has advanced the record of the Circuit Court of Winnebago County, and he can hardly deny its authenticity.

If it were felt that that action was erroneous, there were two opportunities to act—once when this Court was petitioned to clarify its opinion and mandate (*Marino* v. *Ragen,* 333 U. S. 852, 68 S. Ct. 729, 92 L. Ed. 1133), and a second time when a petition for certiorari was filed and denied. (Misc. 30, *Marino* v. *Ragen,* 93 L. Ed. 862, re-hearing denied, L. Ed. 1038.) This Court's opinion in *Marino* v. *Ragen,* 332 U. S. 561, was predicated on a con-

fession of error by the Attorney General of the State of Illinois without any facts having been found and without the Attorney General being cognizant of the true facts in the case. As a consequence, it was necessary in obedience to the mandate of this Court to have a full hearing in the matter. That hearing in the Circuit Court of Winnebago County, Illinois, was a minute investigation of the alleged constitutional errors and found them to be baseless. That decision stands as a final determination on this matter and the petitioner does not allege any different facts or any change in the situation or any reason why this case should be any different now.

We submit that the petition for writ of certiorari in each case should be denied.

ROBERT R. CANFIELD,
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*Assistant State's Attorney,*
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JOHN S. GHENT,
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*Winnebago County, Illinois,*
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## EXHIBIT "A".

**Findings and Decision of the Honorable William R. Dusher.**

| | |
|---|---|
| People of the State of Illinois, *ex rel.* Tony Marino, *Petitioner,* *vs.* Joseph E. Ragen, Warden, Illinois State Penitentiary, etc. | No. 54874. |

The Court: This cause comes on for hearing on the mandate from the United States Supreme Court filed in this court on January 26, 1948 wherein it is stated:

> "It is further ordered that this cause be, and the same is hereby remanded to the circuit court of Winnebago County, of the State of Illinois for appropriate proceedings, in the light of the confession of error filed by the Attorney General of the State of Illinois."

I have construed that mandate to mean that this court should have a full and complete hearing of what transpried in the case of the *People of the State of Illinois* against *Toni Marino,* No. 5963 in this court, which I will hereafter refer to as the Murder case.

Under the law of Illinois, as the court interprets it, this court has no power to do anything other than remand the petitioner to the custody of the Warden of the Illinois State Penitentiary or to discharge him. There is no alternative power in the court.

Under Habeas Corpus Act, Chap. 65, Pg. 1901, it states:

> "No person shall be discharged under the provisions of this act, if he is in custody either—
> By virtue of a final judgment or decree of any com-

petent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree, unless the time during which such party may be legally detained has expired."

It doesn't appear in this case that the time of sentence has expired. The court therefore finds, under the law of Illinois that this court has no power to discharge the petitioner.

However, it is the court's interpretation of the opinion of the United States Supreme Court that the court should inquire fully into and determine whether or not the petitioner received a fair trial in the Murder case, or if he was deprived of any of his constitutional rights. The common law record, as I understood it, at the time I first went into this case, included only the record of the clerk. While it was pending before me, the Supreme Court of Illinois, in the case of *People* v. *Nierstheimer*, 396 Ill. 193, Pg. 197 said that in considering the common law record and what happened, the court should take into consideration the trial judge's docket. Taking into consideration the trial judge's docket in the case of the People *vs.* Toni Marino the court finds the trial judge made the following entry:

"April 23, 1925.

"Defendant in Court in person. Court explains fully to said defendant thru interpreters Daniel Torrisi & Joe Marino meaning & effect of entry of plea of guilty & punishment Court can render in a case of this character. After such explanation, defendant files written waiver of trial by jury & enters plea of guilty to charge in the indictment."

On certiorari, in the United States Supreme Court, that court said in part:

"It does not appear, however, that an attorney was appointed to represent him. The waiver was not in fact signed by him, and no plea of guilty was entered at the trial."

This conclusion was correct, under the confession of error and the admission by the attorney general. However, after a full hearing and I don't think there is any question about it, the evidence, in the opinion of the court, proves by a clear preponderance of the evidence, even beyond any reasonable doubt, in the court's mind, that Tony Marino did sign this jury waiver; that he was advised of its contents and in it there is a plea of guilty. That Marino testified falsely when he said he did not sign this waiver of jury.

The next point mentioned by the Supreme Court is that no plea of guilty was entered at the trial. The common law record, together with the judge's docket shows that a plea of guilty was entered and that Marino was advised of his statutory and constitutional rights. Under the law of Illinois the record of the trial court imports verity and cannot be changed or altered by parole testimony.

The only thing that does not appear in the common law record, taken with the judge's docket, is that no lawyer was appointed for the defendant in the Murder case. That, I think is the principal point involved in this case before the court. Under the law of Illinois it seems to me that before a defendant in a criminal case can raise the question of whether or not he was represented by an attorney and had the benefit of the advice of counsel he must appear before the court and ask for the appointment of a lawyer or state facts to the court that would indicate that he was indigent and could not employ a lawyer.

Now, what are the facts concerning the question of whether or not Marino was advised by counsel? Obviously there isn't any record of the appointment of a lawyer for him, but was he advised by counsel? Shortly after he was arrested, within a matter of one day, I think, after he was taken into custody his friends retained a lawyer for him. They retained Harry B. North,

one of the best and most prominent lawyers in the northern part of Illinois. Mr. North went to the jail with an interpreter, on February 28th and on that day he spent two hours and a half with the petitioner. The petitioner denied this—denied he ever saw North. I can't believe this denial. I think it is a falsehood. Manalli, the interpreter, said he was there with North at that particular time and interpreted from English to Italian and from Italian back to English. The court did not permit any disclosure as to what actually transpired between the two—the attorney and client or the attorney and client and the interpreter or anything that was said. Again, on March 2nd, the same thing occurred. North spent two hours with the interpreter Manilla in the county jail and conferred with Marino. It is the opinion of the court that the disclosure of the time that was spent with Marino was proper for North to testify about. The rights of the petitioner were safeguarded in not permitting any disclosure to be made by the attorney or interpreter as to what the conversation was at the time of those conferences. This was entirely proper and violated no confidences and it wasn't any breach of confidence or any violation of ethics on the part of Mr. North.

Then with respect to the statement made by Marino last Saturday, that he didn't shoot Patterson. I think that statement is a false statement. The evidence concerning that statement was permitted to be put in by the respondent to test the veracity and credibility of the petitioner. It was not for the purpose of determining in this case whether a crime was or was not committed—because I am confining myself entirely to whether or not a fair trial was had by Marino in the Murder case, under the mandate of the United States Supreme Court. The testimony, in my opinion, shows, without any question that North remained under the retainer that had been paid to him until the day

that Marino had his hearing on Mitigation and Aggravation. It is not disputed—the petitioner doesn't deny it, that some time before that hearing Marino said he didn't want a lawyer, that he wanted to plead guilty and throw himself upon the mercy of the court and that is just what he did. In my opinion, he had the benefit of counsel and advice of counsel. I think it is a fair inference that when a lawyer of Mr. North's standing and reputation talked to Marino, once for two and a half hours, and again for two hours, a defendant who was charged at that time with murder (he hadn't been indicted but he must have been charged) at least that is what he was held for—a fair inference would be that Mr. North would inquire as to why he was held and that that question must have been discussed. The court isn't permitted to go into that discussion. The petitioner didn't want it gone into. I think his veracity is broken down on his statement that he didn't shoot Patterson, the first time he said it, according to the evidence and the record, in 23 years. The first time he was up for parole before the Board he said he did shoot Patterson—shot him three times. Then in April, 1947, he told the examining officer of the Division of Correction that he didn't remember. With anybody who has been around a courtroom a while and listened to witnesses' testimony, when they say "I don't remember" that isn't very convincing to a court or to an examiner of facts. In that statement I can't think his veracity held up. Also, under Respondent's Exhibit 1 Tony Marino in effect admitted it in writing to the state's attorney of this county. In that letter he said:

> "I have served more than a half of my entire life for a crime which was not vicious enough to warrant a life sentence. I was sentenced to life imprisonment because I had no one in this country who could advise me what to do with the court's proceedings, and because I was a young boy without any criminal knowledge."

The facts also show that from the second day he was in the county jail there were numerous Italian persons who called on him. At the time of his confession there was Corado, manager of the telephone company, there was a young man named Greely, or something, Joe Marino and Manilla and some other Italian; there were four or five Italians all present. The court is not unmindful that when one of their friends get into difficulties, the Italians are solicitous of his welfare. I am satisfied he was not denied friends visiting him.

In my opinion, as I stated during the course of the argument, the question that is involved in this case is whether or not, under the circumstances of this case, Marino had the advice of counsel. That is the first question to be determined as a matter of fact. In my opinion, he did have the benefit of the advice of counsel. I don't think any other fair conclusion could be reached, from what transpired, with his friends putting up their money for the purpose of hiring a lawyer and the conferences that were had. He denies that he talked to North but I don't think there is any question but what he did. I am not just exactly clear on it but at least a statement was made by Marino—and my recollection is it was in open court—that he didn't want a lawyer, that he wanted to throw himself on the mercy of the court. There isn't any question in my mind but that Judge Reynolds was very zealous to protect the rights of this defendant. They had a hearing on Mitigation and Aggravation and 66 pages of testimony were taken before the court. Further than that, there was a written confession made by the defendant, with four or five or six Italian people standing around at the time it was made.

I feel he was fully advised at the time he made the confession. In my opinion he knew absolutely all of his rights and that he did just exactly what he said he wanted

to do—he wanted to plead guilty and put himself on the mercy of the court and I think he understood and comprehended just exactly what he did.

It does not seem to me that the exact question before this court has been passed on by the United States Supreme Court: Every trial judge knows that when a defendant appears before the court with his lawyer, that it is presumed by the court that his lawyer has explained to him all of his rights under the law and under the constitution. The actual appearance in court with a lawyer is in large measure a formality after the lawyer has advised the defendant concerning his rights. It seems to me that the vital thing is whether or not a defendant has had the advice of counsel previous to a plea of guilty. It does not seem to me that it is vital to the rights of the defendant that his lawyer actually stand with him in court before the judge at the time a plea of guilty is entered or at the time of sentence on a plea of guilty. So in this case, there is no question in my mind but what Marino had been fully advised of his rights, under the law and under the constitution, by Mr. North and that when he stood before the trial judge in the Murder case he had been fully advised and had the benefit of the advice of counsel at the time he plead guilty.

I am not unmindful, in a case of this kind there is a lot of maudlin sentimentalism that creeps into it but on the other hand, society must be protected. If a man is put in the penitentiary, the State of Illinois has provided, through its legislature, the manner in which he shall be discharged. They have created the Division of Correction, commonly known as the Parole Board and it is to that Board a prisoner must address himself, in the manner prescribed, if he complains his sentence is too long.

I am of the opinion that all of the constitutional rights of the defendant were accorded him.

It is the order of the court that the writ of habeas corpus heretofore issued be and the same is hereby quashed and the Petitioner remanded to the custody of the Respondent, Joseph E. Ragen, as Warden of Illinois State Penitentiary at Joliet, Illinois.

I, William R. Dusher, Judge of the Seventeenth Judicial Circuit of the State of Illinois do hereby certify that I was the presiding Judge in the above entitled cause and that the above and foregoing is a full, true and complete report of the proceedings in said trial, including the testimony, rulings of the Trial Judge and all matters upon which rulings were made and other proceedings as shown therein.

Given under my hand and seal, at Rockford, Illinois, this 17th day of May, A. D. 1948.

WILLIAM R. DUSHER,
*Judge.*

(SEAL)

Filed May 17, 1948. Paul N. Wilson, Clerk.